UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA PLAINTIFF

vs. CRIMINAL ACTION NO. 3:09-CR-85-S

KAREN CUNAGIN SYPHER DEFENDANT

SYPHER'S MOTION TO STRIKE THE JURY PANEL AND RENEWED MOTION FOR CHANGE OF VENUE

Comes the defendant by counsel, James A. Earhart, and renews Sypher's requests that the Court dismiss the jury and enter an order granting a change of venue in this case outside the Louisville Division of the United States District Court for the Western District of Kentucky to either the Bowling Green or Owensboro Division, and in support of this motion states as follows:

MEMORANDUM OF POINTS AND AUTHORITIES

In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. The failure to accord an accused a fair trial violates even the minimal standards of due process. In re Oliver, 333 U.S. 257 (1948); Tumey v. State of Ohio, 273 U.S. 510 (1927). 'A fair trial in a fair tribunal is a basic requirement of due process.' In re Murchison, 349 U.S. 133 (1955). Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. The United States Supreme Court observed that to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14 (1954).

Fed. R Crim P. 18 provides that unless a statue or rule permit otherwise, that a trial is to be conducted in the "**district**" where the offense was committed, i.e. the Western District of Kentucky. No particular division within the district is mandated by any statute or the rules. The "district" consists of four divisions - - Louisville, Owensboro, Bowling Green, and Paducah. Fed. R Crim P. 18 provides that the court is to set the place for trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice. See Fed. R. Crim. P. 18. Sypher previously concedes that most convenient location suggests conducting the trial in the Louisville Division of the United States District Court for the Western District of Kentucky.

Upon application of the defendant and for cause, the trial of an accused may be held in any division within a particular district. See 28 U.S.C. § § 1393, 1441. See, e.g., United States v. Fernandez, 480 F.2d 726 (2d Cir 1973). The court has further discretion to move the trial to another district upon the application of the defendant, if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant can not obtain a fair trial there. See Fed. R Crim P. 21(a). The prejudice addressed through Rule 21 (a) is juror prejudice.

Sypher recognizes that it is not required that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any knowledge of a case without more, is insufficient to rebut the presumption of a prospective juror's impartiality. Such a standard would be to establish an impossible standard. It

is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. Spies v. People of State of Illinois, 123 U.S. 131; Holt v. United States, 218 U.S. 245.

The adoption of such a rule, however, cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the accused's life or liberty without due process of law.' Lisenba v. People of State of California, 314 U.S. 219, 236. As stated in Reynolds, the test is "whether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality. The question thus presented is one of mixed law and fact . . . .' Reynolds, 98 U.S a t 156. If a positive and decided opinion had been formed, a prospective juror is incompetent to serve even though it had not been expressed.' Id. at p. 157.

As Chief Justice Hughes observed in United States v. Wood, 299 U.S. 123, 145-146, 'impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.'" The widespread, pervasive nature of the media reports coupled with the prominence and position of the alleged victim in this case make it impossible to seat a fair and impartial jury in the Louisville Division of the United States District Court for the Western District of Kentucky.

A. The Timing and Specificity of the Publicity

The extent and intensity of the publicity in this case is unprecedented in this division. From the date of the underlying incident, the case has been subject to intense media interest. More importantly, the media and community interest in the story has not diminished. Each and every court appearance and filing is covered in depth by the media and is most often the lead story and/or front page news. Moreover, the public prominence of the alleged victim has allowed

him access to media outlets that he has exploited to defuse personal accountability and criticism to fuel media attention and manipulate public opinion. On or about April 9, 2010, Sypher observed in the Motion for Change of Venue that a then current search of th internet reflects that there are over 24,000 reported web results from a search referenced "Sypher and Pitino." A current internet search under "sypher and pitino" returns in excess of 150,000 internet hits.

Since April 24, 2009, the attention and media coverage has been fueled by each and every event that has occurred to date in this case. There were numerous events that sparked increased media attention throughout the course of the case.

1. On or about April 24, 2009, Karen Cunigan Sypher (hereinafter "SYPHER") was charged by the United States Attorney in a criminal complaint.
2. On or about May 12, 2009, a two-count indictment was returned by a federal grand jury sitting for the United States District Court for the Western District of Kentucky
3. In or about July 31, 2010, Sypher predecessor counsel withdrew and present counsel appointed to represent Sypher
4. In or about August 18, 2010, pleadings regarding discovery and other matters.
5. On or about November 18, 2009, a six-count indictment was returned by a federal grand jury sitting for the United States District Court for the Western District of Kentucky,
6. December 22, 2009, Sypher arraignment on Superseding Indictment
7. March 22, 2010, trial date set in the case
8. April 9, 2010, pleadings related to Sypher motion for change of venue
9. May 24, 2010, ruling on motion for change of venue

10. June 24, 2010, juror questionnaires

The parties in this case prepared and submitted a juror questionnaire to be completed by the prospective jurors in this case. Counsel suggested that the prospective jurors in this case be summons to court where they would be given preliminary instructions concerning there conduct and continued exposure to media coverage (i.e. standard admonition). That they then be given the questionnaires to complete and returned to the court that day. That procedure was rejected in favor of mailing the questionnaires to the prospective jurors in advance of the commencement of the jury selection process.

The questionnaire was released to the public/media on or about June 22, 2010, in advance of being mailed to the prospective jurors. The release of the questionnaires sparked another round of intense media coverage to the extent of publication of the proposed questionnaire on media and other internet web sites. Several of the prospective jurors were familiar with the questionnaire in advance of receiving it in the mail.

11. July 6, 2010, United States pretrial memorandum containing a detailed disclosure of the evidence that the United States intended to introduce at trial including potential 404(B) evidence that was the subject of previous filings under seal.

On July 6, 2010, the United States filed its Pretrial Memorandum containing a detailed account of what the United States expected to prove at trial. Included within the pretrial memorandum was a detailed account concerning potential 404(B) evidence about Sypher filing a civil case in 2001 against Auto Glass and More, Inc., and the company owner Leonard LeGrande, who has since died. The memorandum detailed that event including LeGrande's account of the situation given in connection with a deposition in that case. This sparked another round of intense media coverage between the time of the mailing of the juror questionnaires and the

commencement of the jury selection process on July 12, 2010. It was apparent from several of the juror questionnaires that prospective jurors were familiar with this potential 404(B) evidence. The district court had not ruled on the admissibility of the proposed 404(B) evidence. This matter was the subject of previous filings under seal.

12. July 12, 2010, jury selection commenced.

On July 12 , 2010, the prospective jurors were directed to report to the federal courthouse for service in this case. They assembled in the jury room and while counsel and the court dealt with preliminary procedural and substantive matters they waited approximately 31/2 hours before half (approximately 50) of the prospective jurors entered the courtroom. The voir dire process commenced at approximately 11:30 a.m. as to the first group. The remaining 50 jurors continued to assemble in the jury waiting room all day.

Upon completion of the voir dire process of the first group on July 12, 2010, group one was admonished as to their behavior as prospective jurors and released to return the next day. The second group was assembled all day in the jury waiting room. The second group began the voir dire process upon their return on July 13, 2010. Meanwhile, the media selection process sparked another round of intense media interest and coverage the evening of July 12, 2010, including reports of derogatory references to Sypher and Pitino contained within the juror questionnaires.

B. The Status of the Alleged Victim

Equally or perhaps even more compelling, however, is the relative status in the community of the alleged victim compared to that of the accused. It was apparent form the Since 2001, Pitino has been the head coach at the University of Louisville. He has also served as head coach at Boston University, Providence College and the University of Kentucky. He has

coached on the professional level for the NBA's New York Knicks and Boston Celtics. Pitino is the author of a motivational self-help book (and audio recording) named Success is a Choice. He published an autobiography in 1988 entitled Born to Coach describing his life up until his time with the Knicks. **His most recent book "Rebound Rules," was the top seller at the 2008 Kentucky Book Fair.**

While a federal investigation was apparently ongoing, Pitino help a national press conference on April 18, 2009, to announced that he was a target of an extortion attempt. Six days later, on April 24, 2009, SYPHER, the wife of the University of Louisville men's basketball team equipment manager Tim Sypher, was charged by the United States Attorney for the Western District of Kentucky and arraigned in United States District Court for the Western District of Kentucky with extortion and lying to federal agents. Despite Sypher telling police that Pitino had raped her on two occasions, the state declined to file charges against Pitino.

On August 11, 2009, Pitino finally admitted to having consensual sex with SYPHER on August 1, 2003, in a Louisville restaurant, Porcini. Several weeks later, SYPHER told Pitino that she was pregnant as a result of the incident. Pitino paid $3,000 for an abortion and arranged for SYPHER to be taken out-of-town by Tim Sypher[1] to have an abortion. SYPHER later learned that her now estranged husband, Tim Sypher, was paid to marry her.

At a press conference on August 12, 2009, Pitino made a statement, in which he apologized for the affair and stated that he would remain as coach. While Pitino's contract allows for his firing for "acts of moral depravity or misconduct that damages the university's reputation," University of Louisville president James Ramsey announced on August 13, 2009,

[1] The equipment manager for the University of Louisville men's basketball team and long-time associate of Richard Pitino

that despite this incident Pitino would remain head men's basketball coach at the University of Louisville.

On August 26, Pitino again called a national news conference to demand that the media stop "reporting these lies." The news conference acknowledged the continuous and ongoing media attention to this case. The news conference called by Pitino was broadcast live displacing regular local programming and the coverage of the death of Ted Kennedy.

The vast majority of the prospective jurors in this case were from Jefferson County or adjoining county. The local community is the largest concentration of supporters, alumni, fans, and employees of the University of Louisville. College basketball is the single largest revenue sport at the University of Louisville and enjoys intense local fan interest and support. The is an undeniable demonstration of significant and widespread prejudice against SYPHER within the juror questionnaires. Similarly there was an array of opinions concerning Pitino from disgust to admiration of this coaching ability. Few were unfamiliar with Pitino or held no preconceived opinion. The prospective jurors opinion about Pitino is only relevant to the extent it prejudices Sypher, i.e. some indicated that because of his position and notoriety that he would have greater influence (credibility) than Sypher. A preconceived notion of this nature is of concern to Sypher and contrary to the principles governing the trial process.

C. The Nature and Gravity of the Offense

"In the ultimate analysis, only the jury can strip a person of her liberty. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co.Litt. 155b. His verdict must be based upon the evidence developed at the trial." Cf. Thompson v. City of Louisville, 362 U.S. 199. This is true, regardless of the nature of the crime charged, the apparent guilt of the offender or the station in life which she or the alleged victim occupies. It was so written into our

law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807). The theory of the law is that a juror who has formed an opinion cannot be impartial.' Reynolds v. United States, 98 U.S. 145, 155.

There is hardly anything more significant than the deprivation of ones liberty. In the case at bar, SYPHER finds herself charged with serious federal felony criminal offenses carrying a combined potential maximum penalty of 26 years imprisonment and $1.5 million dollars in fines. The United States has advised SYPHER, if convicted, the United States will seek a sentence that includes a significant term of imprisonment.

SYPHER is a mother of 4 children, the youngest of which is 4 years old. She is presently embroiled in a contested divorce case with he estranged husband Tim Sypher that involves the custody of her youngest child. It has been made perfectly clear to her in the state court divorce proceedings that the outcome of this federal criminal case will weigh heavily on that custody decision. The gravity of the offense is significant and the consequences of the outcome of enormous to SYPHER and her children.

D. Actual Prejudice

The voir dire process revealed wide-spread actual prejudice. The use if peremptory challenges alone is insufficient to off-set any potential prejudice caused by the pretrial publicity and or stature of the alleged victim in this community. This factor is directly related to the nature and extent of the publicity. It is hard to imagine that any of the prospective jury panel members from the Louisville Division will not be exposed and affected by the pervasive and continuing publicity. This case does not only involve a public figure, but a public institution that receive significant local community support. The prospect of finding even a single jury unfamiliar with this case and/or a supporter of the University of Louisville in this Division is highly suspect.

Particularly where Jefferson County comprises the majority of the population from which prospective jury pool will be assembled.

Approximately 100 juror questionnaires were completed and returned in this case. Over 50 % expressed opinion relative to the character of the accused and/or guilt of the defendant. Unlike an ordinary case were a prospective juror may hold an opinion about the nature of the offense (i.e. rape, murder, drug dealing etc.) over 50% of the prospective jurors in this instance held a specific opinion not about the nature of the offense but the specific people (defendant and/or alleged victim) of the offense. Sypher was frequently represented as a "golddigger," "untrustworthy," "out to get money," and other less flattering pejorative.

Of the approximate 100 jurors, 3 people were unfamiliar with the allegations in this case prior to receiving the juror questionnaire. Of the approximate 100 jurors, approximately 50% were excused for cause during the voir dire process. Of the approximate 100 jurors, approximately 50% expressed preconceived opinions about the defendant.

The vast majority of the prospective jurors in this case were from Jefferson County or adjoining county. The local community is the largest concentration of supporters, alumni, fans, and employees of the University of Louisville. College basketball is the single largest revenue sport at the University of Louisville and enjoys intense local fan interest and support. The is an undeniable demonstration of significant and widespread prejudice against SYPHER within the juror questionnaires.

E. Presumed Prejudice

Based upon the extensive and continuous nature of media coverage in the local community coupled with the display of the pervasive nature of the actual prejudice demonstrated throughout the voir dire process the court should presume prejudice in this case. A court is

required to find that a trial is unconstitutionally prejudiced, where an inflammatory, circus atmosphere pervades both the courthouse and the surrounding community. See, e.g., Sheppard v. Maxwell, 384 U.S. 333, (1966) (involving a carnival atmosphere at trial, with intense media coverage and presence in the courtroom, and a lack of adequate jury instructions) ; Estes v. Texas, 381 U.S. 532, (1965) (involving a "circus atmosphere," with the press sitting in the bar of the court); Rideau v. Louisiana, 373 U.S. 723 (1963) (presuming prejudice when televised interview of defendant's confession from prison had been widely aired); Irvin v. Dowd, 366 U.S. 717, 725-28 (1961) (involving extensive prejudicial accounts in the media, and where 90% of the venire and eight of twelve jurors believed the defendant was guilty prior to the trial).

The Sixth Circuit Court of Appeals held in DeLisle clarified that courts should only presume prejudice in those cases where the " 'general atmosphere in the community or courtroom is sufficiently inflammatory.' " 161 F.3d at 382 (quoting Murphy, 421 U.S. at 802). Overall, such a trial must be "Entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob." Murphy, 421 U.S. at 799.

E. Danger of Undisclosed Prejudice

SYPHER recognizes that much of the legal authority surrounding a motion for change of venue supports the practice that the court may attempt to seat a jury in the questioned division to explore the impact of potential prejudice. Sixth Circuit authority is clear and undoubtedly the court's consideration of actual prejudice created by pretrial publicity would include a thorough voir dire of potential jurors. Through that process the court must be satisfied that jurors who have been exposed to pretrial publicity do not have a fixed opinion concerning Defendant's guilt and will be able to put aside their views and render a verdict based on the evidence, not pretrial

media reports. However, of grave concern to SYPHER is that even where jurors claim no bias or opinion due to pretrial publicity, those claims of impartiality may not be believable in light of the pretrial publicity and prominence of the victim and the institution that he represents.

Because of the high profile nature of this case, there is always a fear that some individuals will not disclose a deeply held bias in order to serve on the jury. In fact, counsel understands that some jurors who were in the final panel expressed regret through local media channels of being of NOT being able to serve on the jury.

CONCLUSION

Counsel does not represent that any of the jurors selected to serve in this case are not suitable to serve in this case. Counsel is satisfied that all seem qualified and dedicated to their oath to serve. However, the process reflects a wide-spread danger of potential disclosed and undisclosed prejudice toward Sypher that taints the selection process. Counsel respectfully requests that the Court dismiss the jury and grant a change of venue to conduct the trial in either the Bowling Green Division or Owensboro Division of the United States District Court for the Western District of Kentucky. Based upon a totality of the circumstances a trial in Louisville Division of the United States District Court for the Western District of Kentucky does not " . . . satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14 (1954).

Respectfully submitted

/S/ James A. Earhart
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Certificate of Service

I hereby certify that a true and accurate copy of this Motion was sent electronically to all counsel of record this the 13th day of July, 2010, to:

John Kuhn
Assistant United States Attorney
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/S/ James A. Earhart
James A. Earhart